IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

SILVESTRE B. CUEVAS,

Plaintiff,

v. **Civil Action No. 2:08cv16**
(Judge Maxwell)

DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS,
USP-HAZLETON,
JOE DRIVER, Warden,
Defendants.

OPINION/REPORT AND RECOMMENDATION

I. Factual and Procedural History

The *pro se* plaintiff initiated this case on January 17, 2008, by filing a civil rights complaint against the above-named defendants. On January 29, 2008, the plaintiff was granted permission to proceed as a pauper. The plaintiff paid his initial partial filing fee on February 11, 2008. Consequently, on April 7, 2008, the undersigned conducted a preliminary review of the file and determined that summary dismissal was not appropriate at that time. Thus, the Clerk was directed to issue summonses and forward copies of the complaint to the United States Marshal Service for service of process.

On June 6, 2008, the defendants filed a Motion to Dismiss or for Summary Judgment. A Roseboro Notice issued on June 10, 2008.

On July 21, 2008, the plaintiff filed a response to the defendants' motion.

This case is before the undersigned for a Report and Recommendation on the plaintiff's complaint, the defendants' motion and the plaintiff's response.

II. The Pleadings

A. The Complaint

According to the complaint, at the time this case was initiated, the plaintiff had been confined in the Special Housing Unit ("SHU") at USP-Hazelton for 19 months. Complaint at 3. The plaintiff asserts that he was placed in the SHU under protective custody status because of his cooperation with the government. Id. The plaintiff asserts that during his time in the SHU, he has faced ignominy and adversity from staff. Id. In particular, the plaintiff asserts that staff intentionally infected him with Hepatitis A and tampered with his mail. Id. The plaintiff has allegedly pleaded with the administration to protect his rights, but such pleas have not been successful. Id. Instead, the plaintiff asserts that his complaints have exacerbated the problems and placed his life at risk. Id.

As a result of his cooperation with the government, the plaintiff has requested that the Bureau of Prisons ("BOP") separate him from all other inmates. Id. Such separation includes all BOP facilities to which the plaintiff may be transferred. Id. However, the BOP has merely suggested that the plaintiff "immediately advise staff" if he feels his safety is threatened. Id. The plaintiff asserts that this is not an acceptable solution because he has repeatedly advised staff that his life is in danger to no avail. Id. In fact, the plaintiff asserts that in light of his Hepatitis A infection, staff is a part of the reason his life is in danger. Id. Moreover, the plaintiff asserts that rather than insure that his constitutional rights are protected, staff has been deliberately indifferent to his basic human needs. Id. at 4.

The plaintiff further asserts that he has known other inmates who have been granted a blanket separation and knows that it can be done. Id. However, in response to the plaintiff's requests, staff has advised him that they are not "compelled nor required to implement, at the request of inmates,

requests for blanket separation status." Id. However, the plaintiff asserts that one reason for his request is his discovery that an attempt will be made on his life. Id. The plaintiff asserts that the failure to fully respond to his request, or conduct an investigation into the described circumstances, constitutes the failure to protect. Id. Therefore, the plaintiff seeks an Order directing the BOP at USP-Hazelton to implement a blanket separation from all other inmates throughout the remainder of his incarceration. Id. at 5. Moreover, the plaintiff seeks compensation for the damage done to his liver due to his Hepatitis A infection and the psychological distress inflicted upon him. Id.

B. The Defendants' Motion

In their motion, the defendants assert that judgment should be entered in their favor for the following reasons:

(1) a Bivens action cannot be maintained against the Federal Government or its agencies;

(2) the plaintiff has failed to fully exhaust his administrative remedies;

(3) the plaintiff's protective custody claim is moot;

(4) the plaintiff alleges no personal involvement on the part of Warden Driver;

(5) defendant Driver is entitled to qualified immunity; and

(6) to the extent the plaintiff alleges a negligence claim under the Federal Tort Claims Act ("FTCA"), that claim should be dismissed for the failure to meet the jurisdictional prerequisites.

C. The Plaintiff's Response

In his response to the defendants' motion, the plaintiff asserts that his complaint was brought against the defendants in their individual capacities under Bivens. Response at 1, 15. Moreover, the plaintiff asserts that each defendant had "knowledge of the actions of their subordinates and did

nothing to prevent the psychological distress caused upon [him] and the intentional infection of Hepatitis and the intentional tampering of my legal and personal mail." Id. The plaintiff further asserts that the administration's failure to provide him blanket separation status shows a clear indifference to his safety and constitutional rights. Id.

The plaintiff provides the following factual information in support of his claims. He arrived at USP-Hazelton on May 31, 2006. Id. at 2. Upon his arrival, the plaintiff was placed in the SHU pending review. Id. Because an investigation revealed that the plaintiff's safety would be in jeopardy if he were placed in the general population, he was placed in protective custody. Id. While in protective custody, the plaintiff asserts that he has been mistreated by staff. Id. Therefore, the plaintiff filed administrative complaints regarding his treatment and requested to be transferred to another institution. Id. In addition, the plaintiff requested medical attention for severe liver pain. Id. The plaintiff eventually tested positive for Hepatitis A. Id.

When the plaintiff made further complaints against staff, staff allegedly tampered with his mail. Id. The plaintiff asserts that his complaints went ignored. Id.

The plaintiff asserts that after an attempt was made on his life, he requested a blanket separation from all inmates. Id. at 3. The plaintiff asserts that he made the administration aware that staff had "attempted to allow the inmates to try to kill [him]." Id. Additionally, the plaintiff asserts that he again sought a transfer to another institution. Id. The plaintiff asserts that the defendants were clearly aware of the actions of staff, but did nothing. Id. at 3-4. Thus, the plaintiff asserts that he has clearly shown that the defendants are liable under Bivens for the deliberate indifference and wrongful acts of their subordinates. Id. at 4.

With regard to his administrative remedies, the plaintiff concedes that he did not exhaust all

of his administrative remedies. Id. at 5. Nevertheless, the plaintiff also asserts that he failed to exhaust said remedies because staff was tampering with his mail. Id. Specifically, the plaintiff asserts that he sent administrative appeals to the regional office, but that those remedies were held and reviewed by staff. Id. The plaintiff urges the Court to consider that it was in the staffs best interest to not allow him to present his issues to upper levels of the administrative process. Id. Moreover, the plaintiff asserts that when he was able to file the appropriate remedies, the defendants did nothing to investigate his claims. Id. Thus, the plaintiff asserts that he did not fail to exhaust the administrative remedy request, but that he was prevented from doing so. Id. at 6. Therefore, the plaintiff requests the Court allow him to proceed in this case despite the nonexhaustion of his claims. Id.

In response to the defendants argument that a Bivens action cannot be maintained against a federal agency, the plaintiff asserts that "officials in the Dept. of Justice, Bureau of Prisons, and USP Hazelton, who are bound to protect my Constitutional rights failed to do so when they did nothing to prevent that their staff violated my Eighth Amendment rights against cruel and unusual punishment." Id. at 8. Or, in other words, the plaintiff asserts that "he is bringing this suit against the unknown individuals who had knowledge of the violation of my constitutional rights and did nothing to prevent them from happening." Id. The plaintiff asserts that these unknown individuals are therefore, liable for the actions of their subordinates. Id. Moreover, the plaintiff asserts that such individuals conspired to violate his Eighth Amendment rights. Id. at 9.

The remainder of the plaintiff's arguments in his response is more or less a reiteration of the claims already raised in the complaint. Id. at 10-18.

III. Standard of Review

A. Motion to Dismiss

In ruling on a motion to dismiss under Rule 12(b)(6), the Court must accept as true all well-pleaded material factual allegations. Advanced Health-Care Services, Inc., v. Radford Community Hosp., 910 F.2d 139, 143 (4th Cir. 1990). Moreover, dismissal for failure to state a claim is properly granted where, assuming the facts alleged in the complaint to be true, and construing the allegations in the light most favorable to the plaintiff, it is clear as a matter of law that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

When a motion to dismiss pursuant to Rule 12(b)(6) is accompanied by affidavits, exhibits and other documents to be considered by the Court, the motion will be construed as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

B. Motion for Summary Judgment

Under the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying the standard for summary judgment, the Court must review all the evidence "in the light most favorable to the nonmoving party." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The Court must avoid weighing the evidence or determining the truth and limit its inquiry solely to a determination of whether genuine issues of triable fact exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In Celotex, the Supreme Court held that the moving party bears the initial burden of informing the Court of the basis for the motion and of establishing the nonexistence of genuine

issues of fact. Celotex at 323. Once "the moving party has carried its burden under Rule 56, the opponent must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party must present specific facts showing the existence of a genuine issue for trial. Id. This means that the "party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [the] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson at 256. The "mere existence of a scintilla of evidence" favoring the non-moving party will not prevent the entry of summary judgment. Id. at 248. Summary judgment is proper only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita, at 587 (citation omitted).

IV. Analysis

A. Exhaustion of Administrative Remedies

Under the Prison Litigation Reform Act (PLRA), a prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983, or any other federal law, must first exhaust all available administrative remedies. 42 U.S.C. § 1997(e)(a). Exhaustion as provided in § 1997(e)(a) is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001). A Bivens action, like an action under 42 U.S.C. § 1983, is subject to the exhaust of administrative remedies. Porter v. Nussle, 534 U.S. 516, 524 (2002). The exhaustion of administrative remedies "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes,"[1] and is required even when the relief sought is not available. Booth at 741. Because exhaustion is a prerequisite to suit, all available administrative remedies must be exhausted *prior to* filing a complaint in federal court. See Porter,

[1] Id.

534 U.S. at 524 (citing Booth, 532 U.S. at 741) (emphasis added). Moreover, an inmate may procedurally default his claims by failing to follow the proper procedures. See Woodford v. Ngo, 548 U.S.81 (2006) (recognizing the PLRA provisions contain a procedural default component).

The Bureau of Prisons makes available to its inmates a three level administrative remedy process if informal resolution procedures fail to achieve sufficient results. See 28 C.F.R. § 542.10, et seq. This process is begun by filing a Request for Administrative Remedy at the institution where the inmate is incarcerated. If the inmate's complaint is denied at the institutional level, he may appeal that decision to the Regional Office for the geographic region in which the inmate's institution of confinement is located. (For inmates confined at FCI-Morgantown, those appeals are sent to the Mid-Atlantic Regional Director in Annapolis Junction, Maryland.) If the Regional Office denies relief, the inmate can appeal to the Office of General Counsel via a Central Office Administrative Remedy Appeal. An inmate must fully complete each level of the process in order to properly exhaust his administrative remedies.

However, it is widely recognized among the circuits that administrative grievances are not "available" under 42 U.S.C. § 1997(e) when prison officials fail to timely respond to a properly filed grievance. See Boyd v. Corrections Corp. of America, 380 F.3d 989, 996 (6th Cir. 2004); Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003); Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002); Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002); Foulk v. Charrier, 262 F.3d 687, 698 (8th Cir. 2001); Powe v. Ennis, 177 F.3d 393, 394 (5th Cir. 1999); Johnson v. Henson, 2007 WL 135973 (E.D. Cal. Jan. 17, 2007). Thus, those courts have determined that when prison officials fail to respond to properly filed grievances, exhaustion occurs.

Moreover, several courts have found that the mandatory exhaustion requirement may be

excused in certain limited circumstances. See Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (summary dismissal for failure to exhaust not appropriate where prisoner was denied forms necessary to complete administrative exhaustion); Ziemba v. Wezner, 366 F.3d 161 (2d Cir. 2004) (defendant may be estopped from asserting exhaustion as a defense, where the defendant's actions render the grievance procedure unavailable); Aceves v. Swanson, 75 Fed.Appx. 295, 296 (5th Cir. 2003) (remedies are effectively unavailable where prison officials refuse to give inmate grievance forms upon request); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (a remedy is not available within the meaning of § 1997e(a) when prison officials prevent a prisoner from utilizing such remedy); Dotson v. Allen, 2006 WL 2945967 (S.D.Ga. Oct. 13, 2006) (dismissal for failure to exhaust not appropriate where Plaintiff argues that failure to exhaust was direct result of prison official's failure to provide him with the necessary appeal forms).

Here, it is undisputed that the plaintiff exhausted his administrative remedies with regard to his treatment in the SHU and his request for blanket separation status. Petitioner's Ex. A. However, with regard to his other claims, the defendants argue that those claims are not exhausted.

The BOP's records show that the plaintiff filed a formal remedy request regarding a delay in his mail on August 11, 2007. Defendants' Ex. 1 (Declaration of Alecia D. Sankey), Att. B. On September 11, 2007, Warden Driver, without specifically granting or denying the plaintiff's remedy request, responded by stating that the mail was being processed according to policy. Petitioner's Ex. B. The plaintiff failed to appeal that remedy. See Ex. 1 (Sankey Declaration) at ¶ 6. Additionally, the BOP's records show that the plaintiff has not filed a single remedy with regard to his claim that staff intentionally infected with Hepatitis A. Id. at ¶ 7. Accordingly, it is clear that the plaintiff has failed to exhaust his administrative remedies with respect to his claims of mail tampering and

intentional infection of Hepatitis A.

However, in his response to the defendants' motion, the plaintiff asserts that he was prevented from fully exhausting his administrative remedies as to those claims. Specifically, the plaintiff asserts that he prepared administrative appeals, but that staff refused to mail those appeals for him. Response at 5. Moreover, the plaintiff asserts that he attempted to raise the issue of his infection with Hepatitis A in several remedies that were mailed out concerning his request for transfer due to staff's abuse and threats. Id. The plaintiff further asserts that he verbally told staff at USP-Hazelton that he was facing extreme adversity, but that nothing was done to prevent it. Id. Therefore, the plaintiff asserts that he did not fail to exhaust his administrative remedies, but that he was prevented from doing so.

Based on the record currently before the Court, the undersigned finds that a genuine issue of material fact remains with regard to whether the plaintiff failed to exhaust his available administrative remedies. Accordingly, the undersigned believes that the dismissal of the plaintiff's claims for the failure to exhaust is inappropriate at this time.

B. Deliberate Indifference[2]

In general, the Eighth Amendment prohibits "cruel and unusual punishment." Farmer v. Brennan, 511 U.S. 825 (1994). In order to comply with the Eighth Amendment, prison punishment must comport with "the evolving standards of decency that mark the progress of a maturing society." Estelle v. Gamble, 429 U.S. 97, 102 (1976). "A prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official

[2] Because the plaintiff clearly states in his response to the defendants' motion that he has not, and did not intend to raise a claim under the FTCA, the defendants' argument that the plaintiff has failed to meet the jurisdictional prerequisites for filing an FTCA claims is moot and the Court will not consider that argument further.

knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. at 837.

1. Department of Justice and Bureau of Prisons

A Bivens cause of action is only available against federal officers in their individual capacities, and not the federal agency which employs the persons acting under federal law. See FDIC v. Meyer, 510 U.S. 471, 484-86 (1994) (refusing to find a Bivens remedy against a federal agency); see also Randall v. United States, 95 F.3d 339, 345 (4th Cir. 1996) ("Any remedy under Bivens is against federal officials individually, not the federal government."). Thus, the plaintiff's Bivens claims against the Department of Justice ("DOJ") and the BOP must be dismissed.

2. USP-Hazelton

In order to state a successful claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that a *person* acting under color of state law deprived him of a right guaranteed by the Constitution or federal laws. Rendall-Baker v. Kohn, 457 U.S. 830, 838 (1982) (emphasis added). Because Bivens was created as a counterpart to § 1983, so that individuals may bring a suit against a federal actor for violating a right guaranteed by the United States Constitution or federal law, see Bivens, 403 U.S. at 395, it stands to reason that in order to state a successful claim under Bivens, a plaintiff must likewise demonstrate that a "person" acted under color of federal law to deprive him of a right guaranteed by the Constitution or federal laws.

Here, the plaintiff cannot establish that USP-Hazelton is a "person" for purposes of Bivens. See Preval v. Reno, 203 F.3d 821 (4th Cir. 2000)(unpublished) ("[T]he Piedmont Regional Jail is not a'person,' and therefore not amenable to suit under §42 U.S.C. 1983"); Roach v. Burch, 825 F.

Supp. 116 (N.D.W.Va. 1993) (The West Virginia Regional Jail Authority is "in effect the State of West Virginia" and is not a person under § 1983); Brooks v. Pembroke City Jail, 722 F.Supp. 1294, 1301 (E.D.N.C.1989) ("Claims under § 1983 are directed at 'persons' and the jail is not a person amenable to suit."). Accordingly, USP-Hazelton should be dismissed as a defendant in this action.

3. Joe Driver and Unknown Named Defendants of the DOJ, BOP and USP-Hazelton

Liability in a Bivens case is "personal, based upon each defendant's own constitutional violations." Trulock v. Freeh, 275 F.3d 391, 402 (4th Cir.2001)(internal citation omitted). Therefore, in order to establish liability in a Bivens case, the plaintiff must specify the acts taken by each defendant which violate his constitutional rights. See Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994); Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3rd Cir. 1988). Some sort of personal involvement on the part of the defendant and a causal connection to the harm alleged must be shown. See Zatler v. Wainwright, 802 F.2d 397, 401 (11th Cir. 1986). *Respondeat superior* cannot form the basis of a claim for a violation of a constitutional right in a Bivens case. Rizzo v. Good, 423 U.S. 362 (1976).

With respect to Warden Driver and the Unknown Named Individuals of the DOJ, BOP and USP-Hazelton, the plaintiff asserts no personal involvement on the part of any of those defendants in the alleged violations of his constitutional rights. Instead, the plaintiff merely asserts that those persons had supervisory authority over the alleged violators and that they should have done something to prevent the alleged violations of the plaintiff's rights.

In Miltier v. Beorn, 896 F.2d 848, 854 (4th Cir. 1990), the Fourth Circuit recognized that supervisory defendants may be liable in a Bivens action if the plaintiff shows that: "(1) the supervisory defendants failed to provide an inmate with needed medical care; (2) that the supervisory

defendants deliberately interfered with the prison doctors' performance; or (3) that the supervisory defendants tacitly authorized or were indifferent to the prison physicians' constitutional violations." In so finding, the Court recognized that "[s]upervisory liability based upon constitutional violations inflicted by subordinates is based, not upon notions of *respondeat superior*, but upon a recognition that supervisory indifference or tacit authorization of subordinate misconduct may be a direct cause of constitutional injury." Id. However, the plaintiff cannot establish supervisory liability merely by showing that a subordinate was deliberately indifferent to his needs. Id. Rather, the plaintiff must show that a supervisor's corrective inaction amounts to deliberate indifference or tacit authorization of the offensive practice. Id.

In this case, the plaintiff has not provided any evidence that defendant Driver or any of the unknown named defendants tacitly authorized or were indifferent to an alleged violation of his constitutional rights. Instead, it appears that those defendants simply failed to grant the plaintiff relief during the administrative process. However, an administrator's participation in the administrative remedy process is not the type of personal involvement required to state a Bivens claim. See Paige v. Kupec, 2003 WL 23274357 *1 (D.Md. March 31, 2003). Accordingly, the plaintiff cannot maintain a Bivens claim against Warden Driver or the unknown named defendants of the DOJ, BOP and USP-Hazelton.

4. Mootness

Article III of the United States Constitution, limits the jurisdiction of the federal courts to cases or controversies. Therefore, a case becomes moot when there is no viable legal issue left to resolve. See Powell v. McCormick, 395 U.S. 486, 496 (1969). If developments occur during the course of a case which render the Court unable to grant a party the relief requested, the case must

be dismissed as moot. Blanciak v. Allegheny Ludlum Co., 77 F.3d 690, 698-699 (3d Cir. 1996).

A review of this case shows that the plaintiff seeks injunctive relief against the defendants in the form of an Order directing the defendants to give the plaintiff the blanket separation status that he requests. However, "a claim for injunctive or declaratory relief must be dismissed as moot where the relief sought would, if granted, not make a difference to the legal interests of the parties." See Defendants' Memorandum at 8 (citing Magee v. Waters, 810 F.2d 451, 452 (4th Cir. 1987) (transfer to another institution rendered inmate's request for injunctive relief moot)). Here, the plaintiff has been released from the custody of the BOP. Thus, the court is unable to grant the plaintiff the relief requested and his claim for injunctive relief is moot.

V. Recommendation

For the foregoing reasons, the undersigned recommends that the defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (dckt. 24) be **DENIED to the extent** that it seeks dismissal of this action on exhaustion grounds, but **GRANTED to the extent** that the defendants' seek judgment as a matter of law. Therefore, the undersigned recommends that judgment be entered for the defendants and the plaintiff's complaint be **DENIED** and **DISMISSED with prejudice** from the active docket of this Court.

Within ten (10) days after being served with a copy of this Opinion/Report and Recommendation, any party may file with the Clerk of Court written objections identifying those portions of the recommendation to which objection is made and the basis for such objections. A copy of any objections should also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to this recommendation will result in waiver of the right to appeal from a judgment of this Court based upon such recommendation. 28 U.S.C. §

636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).

The Clerk is directed to send a copy of this Opinion/Report and Recommendation to the pro se petitioner by certified mail, return receipt requested, to his last known address as shown on the docket, and to counsel of record via electronic means.

DATED: November 17, 2008.

John S. Kaull
JOHN S. KAULL
UNITED STATES MAGISTRATE JUDGE